2000

Doxey-Layton Company v. Clark : Brief of Respondent

Utah Supreme Court

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17071

IN THE SUPREME COURT OF THE STATE OF UTAH

DOXEY-LAYTON COMPANY, a corporation and LYARD McCONKIE and ILENE McCONKIE, his wife,

Plaintiffs - Appellants,

vs.

VENDETTA CLARK, HAROLD RALPHS, TWILA JOHNSON, CECIL G. RALPHS, RUBY POWELL, and DENNIE RALPHS, being the heirs of the deceased, WILLIAM A. RALPHS and BERTHA RALPHS, his wife, and any unknown heirs of the deceased, WILLIAM A. RALPHS and BERTHA RALPHS, his wife, and DENNIE RALPHS and CHEVRON OIL COMPANY, a corporation,

Defendants - Respondents.

Case No. 14097

BRIEF OF RESPONDENTS OTHER THAN CHEVRON OIL COMPANY

Appeal from Judgment of the Fourth District Court
Duchesne County, State of Utah
The Honorable J. Robert Bullock, Judge

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STATEMENT OF NATURE OF THE CASE

Plaintiffs commenced the action to quiet title to both certain real property and mineral rights in Duchesne County, and to have a mineral lease to Chevron Oil Company declared void. All of the defendants answered declaring the mineral lease to be valid, and in addition, the defendants other than Chevron counterclaimed, alleging that they were entitled to 75% of the mineral rights in and to the subject property.

DISPOSITION IN LOWER COURT

These defendants agree with the plaintiffs' statement of the disposition in the lower court, except to add the fact, that the deed that the court ordered to be reformed, was not recorded until May 15, 1970.

RELIEF SOUGHT ON APPEAL

The individual defendants seek affirmance of the entire judgment of the lower court.

STATEMENT ON FACTS

On or about September 7, 1962, Willaim A. Ralphs and Bertha Ralphs, his wife, hereafter referred to as Ralphs, did sell, pursuant to a Uniform Real Estate Contract, to Hank Swain and Donna Swain (see Exhibit 1), the following described real and personal property in Duchesne County, State of Utah:

TOWNSHIP 1 SOUTH, RANGE 4 WEST, UINTAH SPECIAL MERIDIAN

Section 1: Southeast Quarter of Northwest Quarter; Northeast Quarter of Southwest Quarter; and the West half of the Northeast quarter.

Section 12: Northeast quarter of Northeast quarter.

TOGETHER with 130 shares of capital stock of Dry Gulch Irrigation Company, Class "A" Stock.

ALSO: One (1) oil heating stove and One (1) Butane tank.

TOGETHER with an undivided 25 percent of oil, gas and mineral rights but excepting therefrom a lease now in existence.

(NOTE: The mineral lease referred to above, is not the mineral lease that is of concern to this law suit.)

At the time Exhibit 1 was executed, the Ralphs also executed a warranty deed from themselves as grantors to the Swains as grantees, that was placed in escrow at First Security Bank of Utah, Roosevelt office. However, there was an error in the legal description of the property sold by Ralphs to Swains, in that that portion of Section 1 described as the West half of the Northeast quarter should have been the West

half of the Southeast quarter. Prior to August 13, 1963, the Swains did bargain, sell and assign all of their rights, title and interest in and to said contract between themselves and the Ralphs to K. C. Ranches, Inc., at which time the error in the legal description became apparent. Without preparing a new Uniform Real Estate Contract, K. C. Ranches Inc. entered into an "Amendment to Uniform Real Estate Contract" (Exhibit 2) with the Ralphs, wherein the parties acknowledged the erroneous legal description and the assignment from Swains to K. C. Ranches. The parties specifically provided in said amendment, "Whereas, the parties hereto mutually desire to amend said contract the legal description contained therein." and "Except as herein modified, all remaining terms, conditions and provisions of said Uniform Real Estate Contract shall remain in full force and effect." (Emphasis added).

Due to the error in the legal description, and as an accommodation to K. C. Ranches, the Ralphs executed a new warranty deed (Exhibit 3) wherein K. C. Ranches Inc. was named the grantee, and the correct legal description was used. Due to a scrivener's mistake, the new warranty deed did not contain a reservation of 75% of said mineral rights in favor of said grantors, as called for in the original contract of sale (Exhibit 1) and in the amendment to the same (Exhibit 2). However, before the Ralphs would sign said amendment or the new deed, they were personally assured by the President of K. C. Ranches, Mr. Carl Bennett, that except for the change in the legal description, everything would remain the

same, including mineral rights (see lines 15-20, pg. 27 of Transcript, or pg. 181 of Record).

From and after August 13, 1963, until on or about May 15, 1970, said Uniform Real Estate Contract, together with its amendment and the warranty deed, remained escrowed. When the contract was fully performed, the warranty deed was released from escrow, delivered to the plaintiff Doxey-Layton, and on May 15, 1970, it was duly recorded in the records of Duchesne County, Utah, (Exhibit 3).

On September 23, 1965, the Ralphs did lease all of the subject mineral acres to the defendant Chevron, which lease was duly recorded in the records of Duchesne County, Utah, (Exhibit 10), and in 1972 a producing well was drilled on said land.

On or about November 4, 1965, the plaintiff Doxey-Layton became aware of the fact that one of its employees, namely Mary Bennett, the wife of said Carl Bennett, the President of K. C. Ranches, Inc., had wrongfully used or embezzled funds of Doxey-Layton, which funds were used to acquire certain assets and properties of K. C. Ranches, Inc., including the property which is the subject of this litigation. By way of partial restitution, Mary Bennett, Carl Bennett and K. C. Ranches, Inc., assigned and conveyed all of their rights, title and interest in and to the subject property to the plaintiff Doxey-Layton (See Exhibits 4, 5, and 6).

The plaintiff Doxey-Layton conveyed only its surface rights in the subject lands by warranty deed (Exhibit 7)

and 3/8ths of its mineral rights by quit-claim deed (Exhibit 14), to the plaintiffs Lyard McConkie and Ilene McConkie, his wife, which deeds were recorded May 15, 1970, in the office of the Duchesne County Recorder.

By reason of the recording of the warranty deed, the Ralphs were placed on constructive notice of the error in the retention of the mineral rights on May 15, 1970. However, actual notice was not received by the Ralphs until October, 1971. Thereafter in November, 1971, Mr. Ralphs filed and recorded an Affidavit of Interest in the office of the Duchesne County Recorder, claiming 75% of the minerals in and to the subject land (Exhibit 13). On or about May 27, 1972, the Ralphs executed and delivered a quit-claim deed for all of their minerals in the subject land, plus two-thirds of the minerals in an additional 40 acres (see Exhibit 8), to the individual defendants herein, which deed was duly recorded in the office of the Duchesne County Recorder. Any reference herein to the individual defendants will mean those defendants who were both the lawful heirs of the Ralphs and who succeeded to the mineral interests of the Ralphs pursuant to Exhibit 8.

The attorney for the plaintiffs, knowing of the claims of the individual defendants, did arrange for the attorney for the individual defendants to accept service of process through the mail from the plaintiffs' attorney, on behalf of the individual defendants. The plaintiffs' original complaint was filed in January, 1973, and was thereafter twice amended by the plaintiff. All of plaintiffs' complaints acknowledged the claim of the

Ralphs and therefore that of the individual defendants by stating that the Ralphs "may claim a 75% interest" in said mineral rights. However, in both the original complaint and in the first amended complaint, the plaintiffs named the Ralphs and only one of their grantees as parties to the action. At the time, of both amendments, the Ralphs were deceased, but prior to their death or the commencement of this action, the Ralphs had deeded all of their mineral rights to the individual defendants (Exhibit 8), which deed was subsequently recorded on April 7, 1973. The attorney for the individual defendants notified plaintiffs' attorney of that fact, first verbally and then in the answer of the individual defendants. The answer of the defendant Chevron Oil Company in February, 1973, also placed the plaintiffs on formal notice that the Ralphs were dead, prior to the commencement of this action. The attorney for the individual defendants did encourage the plaintiffs' attorney to make the necessary corrections or amendments to plaintiffs' complaint before the individual defendants filed their response especially since personal service would be waived. Although said amendment was promised by plaintiffs' attorney, the same was not forthcoming until seven (7) days after the individual defendants had determined to go ahead and file their answer and counterclaim, at which time the plaintiffs did then file their "Second Amended Complaint". Subsequent to said filing, the plaintiffs moved the court for leave to file the same, which leave was granted.

The plaintiffs sought summary judgment based on the pleadings and affidavits, but the same was denied by the trial

court. The matter was tried to the court on March 18, 1975.

ARGUMENT

POINT 1

THE TRIAL COURT CORRECTLY FOUND THAT THERE WAS A SCRIVENER'S MISTAKE IN THE DEED DATED AUGUST 13, 1963, AND THAT THE STATUTE OF LIMITATIONS SHOULD NOT BAR THE REFORMATION OF SAID DEED BY REASON OF THE DOCTRINE OF ESTOPPEL IN PAIS.

Nothing in the stipulated facts or the exhibits would indicate that the warranty deed dated August 13, 1963, was prepared by either the Ralphs or any of their agents. The Ralphs were not aware of the error in the legal description in either the contract or the deed to Swains. The error in the description was discovered by either the Swains or K. C. Ranches, Inc., or their agent, but in either event, the Swains or K. C. Ranches, Inc. would bear the same legal relationship to the Ralphs. While the plaintiffs did not produce a copy of the assignment from Swains to K. C. Ranches, Inc., it is apparent from Exhibit 2 that the Ralphs were duly informed of the assignment and accepted the substitution of K. C. Ranches, Inc., in lieu of the Swains. However, before the Ralphs would execute either Exhibit 2 or Exhibit 3, they insisted that Mr. Gardner be present (see Transcript pg. 24, line 30, and pg. 25, lines 1-6). At the request of Mr. Bennett, Mr. Gardner did accompany Mr. Bennett to the home of the Ralphs in Lehi, Utah. Prior to the execution of either of said documents,

Mr. Bennett reassured the Ralphs that the only purpose for either the amendment or the deed would be to correct the erroneous legal description, and that the mineral rights would remain the same (Transcript, pg. 27, lines 15-20).

Based on the assurance of the President of K. C. Ranches, Inc., the Ralphs did execute both the amendment to the Uniform Real Estate Contract and the new deed. It is unfortunate that the scrivener's mistake was not noted at that time, but with the verbal assurances that were given, and the express language of the amendment stating that the only change was in the legal description, and that "all remaining terms, conditions and provisions....shall remain in full force and effect" (emphasis added) would surely cause the average person or the "reasonable man" to assume that the same would in fact be done.

Due to the fact that the Uniform Real Estate Contract was escrowed, said deed was not recorded until the purchaser or purchasers had fully performed all of its or their obligations under said contract. Until said deed was duly recorded on May 15, 1970, the Ralphs and their assignees were not charged with notice of the mistake. The trial court correctly found that the omission of the mineral rights was a scrivener's error, and any serious reading of the amendment to the Uniform Real Estate Contract will sustain that finding.

Despite aspersions against Mr. Gardner in plaintiffs' brief, Mr. Gardner had no responsibility for the preparation of either the warranty deed or the amendment to the contract.

Mr. Gardner had no commission pending the successful execution of the assignment from Swains to K. C. Panches, Inc. In fact, as mentioned above, Gardner was brought into the K. C. Ranches-Ralphs transaction at the request of the President of K. C. Ranches, Inc., after Mr. Ralphs had refused an annual contract payment from Mr. Bennett (See Transcript pg. 24, lines 18-30, and pg. 25, lines 1-24), and Ralphs had insisted that Mr. Gardner be present before Ralphs did anything. Surely, Mr. Gardner's presence in the Ralphs' home was as much or more of an accommodation for K. C. Ranches as it would be for the Ralphs. In addition, Mr. Gardner did not give any "assurances" to the Ralphs as he had none to give. He did read the amendment to them and on the deed he read only the persons involved and the legal description (Transcript, pg. 36, lines 23-28). If any representations were made by Mr. Gardner to the Ralphs, they were surely the result of both the typed amendment (Exhibit 2), which terms were reasonably clear, and the verbal representations of Mr. Bennett. But in no event was Mr. Gardner the agent of the Ralphs in the Ralphs--K. C. Ranches, Inc. transaction.

The plaintiff Doxey-Layton is the assignee (Exhibit 6) of all of the interests of K. C. Ranches, Inc. in and to the subject land. By no stretch of the imagination does Doxey-Layton fit into the category of an innocent third-party purchaser of either the land or the minerals. Doxey-Layton took what it could to recover a loss occasioned by one of its dishonest employees. By reason of the assignment from K. C. Ranches, Inc. to Doxey-Layton, the plaintiff Doxey-Layton must stand in

the same position as K. C. Ranches, Inc., taking no more and no less than K. C. Ranches had. Said principle of law is well established and is clearly enunciated in 6 Am Jur 2d, Assignments, Sec. 102, as follows:

> "In an action on the claim assigned, the assignee is ordinarily subject to any setoff or counterclaim available to the obligor against the assignor and to all other defenses and equities which could have been asserted against the chose in the hands of the assignor at the times of the assignment. (pg. 283)
>
> "The rule that the assignee of a nonnegotiable instrument takes it subject to equities applies to contracts generally, and has been applied to contracts for the sale of land, contracts for the sale of chattels, book accounts, bonds, receipts, bills of lading, and judgments." (pg. 284)

This principle is further stated in 77 Am Jur 2d, Vendor and Purchaser, Sec. 289, at page 534, as follows:

> Under the general rule that the assignee of a nonnegotiable chose in action ordinarily acquires no greater right than was possessed by his assignor, and takes subject to all equities and defenses which could have been set up against the chose in action in the hands of the assignor at the time of the assignment, it is held that an assignee of a purchaser of real estate takes subject to all the rights of the vendor under the original contract of sale, including all defenses thereto available to the vendor. Thus, it has been held that the assignee of a land contract stands in no more favorable position than the original purchaser, who has become barred by laches from enforcing particular rights under the contract against the vendor. The rule that an assignee of a purchaser of real estate takes subject to all the rights of the vendor under the original contract of sale has been regarded as applicable irrespective of notice or of the fact that the assignment was for a valuable consideration. (Emphasis added).

By reason of that principle of law, Doxey-Layton can have no better position than that of its assignor, K. C. Ranches, Inc. Any defenses that are or were available to the Ralphs or their grantees as to K. C. Ranches, Inc., would be available

to the Ralphs or their grantees as against the claims of Doxey-Layton. Therefore, the unusual circumstances and verbal assurances by Carl Bennett as the President of K. C. Ranches, Inc., to the Ralphs at the time the allegedly corrected deed and amendment to Uniform Real Estate Contract were executed, could properly be testified to by Mr. Gardner.

Plaintiffs' brief correctly states the law (i.e. 13 Am Jur. 2d, Section 34, page 525, and 17 Am. Jur. 2d, page 498), relative to the finality of a deed or a contract, but defendants do emphasis the importance of certain language in the citations quoted in plaintiffs' brief, namely "special circumstances," or "where the one executing the document is not mislead as to its contents". It would seem that the most casual reading of the transcript of the trial and/or of the amendment to the Uniform Real Estate Contract (Exhibit 2) would cause the reasonable man to conclude that when the Ralphs executed the deed (Exhibit 3), there surely were some "unusual circumstances" and they were "mislead as to its contents."

In addition, the plaintiffs have missed the fact, as stressed by the lower court (Transcript, pg. 21, lines 2-30, and pg. 22, lines 1-74), that the counterclaim of the individual defendants seeks a reformation of the deed of August 15, 1963, so as to correct the scrivener's error in said deed, which error resulted from a mutual mistake of fact. It was the uncontroverted testimony of defendants' witnesses that the Ralphs intended to reserve 75% of the minerals and that K. C. Ranches knew of that fact and consented thereto. This court has most recently

ruled on the right of a party to reform an instrument to conform to the oral understanding of the parties, in the case of Bench v. Pace, ? Utah 2d ?, 538 P.2d 180, where this court quoted from the earlier case of Sine v. Harper, 118 Utah 415, 222 P.2d 571, as follows:

> ". . . . . The right to reform is given, at least in part, so as to make the written instrument express the bargain the parties previously orally agreed upon. When a writing is reformed, the result is that an oral agreement is by court decree made legally effective although at variance with the writings which the parties agreed upon as a memorial of their bargain. The principle itself modifies the parole evidence rule." (Emphasis added).

In this case, the individual defendants desire the court to reform Exhibit 3 to conform to the oral terms agreed to by the parties, as well as the written terms agreed to in Exhibits 1 and 2.

In Bench v. Pace (op. cit.) this court also quoted Williston on Contracts, Vol. 13, 3d Ed. Sec. 1552, in part as follows:

> ". . . . . It is understood that to warrant reformation or recession, the court must be persuaded by the clearest kind of evidence that a mistake has been made by both parties, or in some cases by one, or that some other basis exists upon which relief should be granted."

The individual defendants would urge that the review of Exhibits 1 and 2 and the testimony of Max Gardner is the "clearest kind of evidence" that a scrivener's mistake was made in Exhibit 3 and that said deed should be reformed to conform to the same. "The omission of the [mineral rights] was a mistake of fact rather than a mistake of law inasmuch as in view of all circumstances it appears the omission was an oversight on the part of the scrivener and the parties to the

[deed], and the conduct of the plaintiffs clearly shows that they made no claim to the mineral estate until shortly before this suit was initiated." (quoting in part from Bench v. Pace, op. cit. at page 183).

Plaintiffs' brief on page 8 tried to make a point of the fact that Mr. Ralphs and the witnesses for the individual defendants at the trial were confused as to the amount of minerals the Ralphs and their grantees were to have. First, it should be stressed, that Mr. Gardner and Mrs. Powell testified that at a meeting in March, 1972, the President of Doxey-Layton informed those present that Doxey-Layton was going to keep the minerals. (See Transcript pg. 42, lines 2-25, and pg. 43, lines 7-13). However, at a earlier meeting, the representatives of Doxey-Layton had seemed "surprised" at the fact that they had title to all of the minerals. (See Transcript pg. 41, lines 24-28). Secondly, in the deed dated May 27, 1972, (Exhibit 8), Mr. Ralphs did not claim 66 2/3% of the mineral rights in the subject property. A casual examination of that document will indicate that the author of the same should take no great pride in its draftsmanship, but that the 66 2/3% refers to mineral rights on separate land, and then the word "ALSO" is used to describe the mineral acreage subject to this litigation, and no percentage is indicated for it. When you consider Exhibit 8 with Exhibit 13, and Exhibits 1 and 2, then there is a consistent claim by the Ralphs as to the 75% of the minerals in the subject property. Furthermore, when Ralphs leased the subject minerals to Chevron in 1965, it

was necessary that they lease 100% of the minerals; the right of K. C. Ranches, Inc., to any of the minerals was still contingent upon the faithful performance by K. C. Ranches of the terms contained in the Uniform Real Estate Contract, including payment in full of the purchase price. Thus for the Ralphs to lease 100% of what they still had the right to lease was not confusion but the proper thing to do. After the faithful performance by K. C. Ranches, Inc., or its assignees of the contract of sale, then the Ralphs were obligated to assign 25% of their lease rights with Chevron to K. C. Ranches, Inc., or its assignees. The Ralphs have always been willing to do this, but the plaintiffs have sought to take advantage of the scrivener's error, and claim the entire mineral estate.

Plaintiffs place great reliance on the McKellar case, 23 Utah 2d 106, 458 P.2d 867, however, the individual defendants can find little solace for the plaintiffs there. That case involved the execution of a deed that included property that one of the grantors allegedly did not intend to convey. Several years later, the objecting grantor and other family members entered into a written agreement which in effect approved the grant made in the earlier deed. Furthermore, the deed had been executed and recorded for more than 21 years prior to the commencement of the action. Contrary to plaintiffs' assertion, in the McKellar case the court does not make a hard and fast rule that the time of the execution is the time that the statute contemplates for running the statute of limitations. Even plaintiffs' brief acknowledges that, for it quoted the court

stating "The critical issue revolves around the time of discovery of the mistake....." (Emphasis added).

If the time of discovery was to be presumed to be the date that the deed was signed, then no party in this state could afford to enter into an escrow agreement such as is involved here, for all that an unscrupulous person would need to do would be to have a contract which clearly indicates that the minerals will be reserved to the grantor, but intentionally or even inadvertently omit that reservation from the deed, which deed is escrowed, then wait until the three years have passed, and then claim the right to all of the minerals. Such a construction of the statute is so patently unfair and so contrary to the real spirit of the statute, that no further comment should be necessary. Furthermore, the individual defendants would draw the court's attention to the following citation quoted in the plaintiffs' brief, from the McKellar case (Ibid):

> "Although plaintiffs have not pleaded the circumstances that contributed to the alleged unawareness of the grantors at the time when they executed the conveyance of 1947, the rule stated by the court in Hjermstad v. Barkuloo is relevant:
>
> > 'It is a general rule that a party will not be relieved, either by a court of equity or a court of law, where he executes an instrument without reading it, when he has it in his hands and negligently fails to ascertain the contents of it; the other party not being guilty of deceit or false representations as to its contents, by means of which he is put off his guard.'"
> > (Emphasis added)

The trial court in weighing the testimony on behalf of the defendants, which testimony the plaintiffs did not deny, but only objected to because of the hearsay rule, believed

the testimony of Mr. Gardner, that there were false or misleading representations by Mr. Bennett at the time Ralphs executed the deed. While the false representations may have been made without malice, there was at least scienter on the part of Mr. Bennett when he represented that except for the change of the erroneous legal description, the second deed was exactly the same as the first deed. That representation was false because the second deed did not contain the reservation of the minerals. The Ralphs did not prepare the second deed, nor was it prepared under their direction. There is nothing in the record that should cause the plaintiffs to reach the conclusion that the Ralphs "knew, or indeed should have known. . . there actually was a mistake. . . in the August, 1963 deed." Were it not for the Ralphs children checking the record, the Ralphs might never have actually learned of the mistake in that deed. However, by reason of the recording statute, the Ralphs were placed on constructive notice of the scrivener's mistake on May 15, 1970.

Plaintiffs would like to have this court hold that the running of the statute of limitations coincided with the execution of the deed. The unreasonableness of the application of that proposition to this fact situation has already been treated. However, a response to the proposition that the individual defendants did not "commence an action" within three years of the recording of the deed on May 15, 1970, is needed.

First of all, the purpose and policy behind the statute of limitations should be remembered. The statute's purpose is so

that there may be a time certain within which an action will be "commenced". Once that prescribed time has expired, a person may know and be assured that the issue thus barred will not or should not be brought up or raised again. However, the statute of limitations is a personal right and not a public right, for its purpose is to assist the individual to prepare his defense against the claim that will by statute be barred after the prescribed date. Since it is a personal right, the courts have long acknowledged that a person can waive the defense of the statute by either his expressed or implied consent or action. It is the contention of the individual defendants that, the trial court correctly found that inasmuch as the claim of the individual defendants was in the nature of a compulsory counterclaim, and since their claim was first raised in the plaintiffs' pleadings, the defendants were entitled to assert the same herein; and not withstanding that, the conduct of the plaintiffs' counsel herein, relative to delays in amending plaintiffs' pleadings so as to name the correct defendants, constitutes estoppel in pais, which estoppel now bars the plaintiffs from using the statute of limitations as a defense to the defendants' counterclaim.

In this matter the plaintiffs would normally have been able to rely upon the fact that after May 15, 1973, there would be no actions by the Ralphs or their grantees, etc., relative to the deed that was recorded on May 15, 1970, from Ralphs to K. C. Ranches, Inc. However, prior to May 15, 1973, the plaintiffs started an action, in which they asserted the basis of the

defendants' counterclaim. The plaintiffs knew that the individual defendants, were prepared to file their own action and that they were represented by counsel. If not, then why would the plaintiffs' counsel rely upon the counsel for the individual defendants to accept service on behalf of the individual defendants? Also, the plaintiffs effected no other service in this matter upon the individual defendants and had no jurisdiction over them, except for the appearance of counsel on behalf of said defendants. The plaintiffs alleged in their complaint that the Ralphs claimed 75% of the minerals. Thereafter, the individual defendants tried to get the plaintiffs to amend their complaint so as to correctly state the proper defendants, since both of the Ralphs were dead and the Ralphs had conveyed their interest to the individual defendants. From the beginning, the plaintiffs were charged with notice that they had omitted at least some of the individual defendants. Although the plaintiffs made their first amendment in April, 1973, they still failed to correctly identify and include the individual defendants. Counsel for the individual defendants again requested the plaintiffs to correctly name the proper defendants. Counsel for the plaintiffs agreed to make the necessary amendments, but the same were not made until immediately after the individual defendants had made their general appearance in June, 1973, by filing their answer and counterclaim. Then the plaintiffs sought to defeat the counterclaim of the individual defendants by asserting that the claim was barred by the statute of limitations. Since the plaintiffs had been aware from the beginning of defendants' defense and

counterclaim, it would appear that the plaintiffs' delay in filing their amended complaint, correctly naming the individual defendants, was to induce the individual defendants to wait until after May 15, 1973, to file their pleadings. If such is not the case, why else would the plaintiffs have waited so long to file their second amended complaint, but then file it immediately, even without leave of court, after the individual defendants filed their answer and counterclaim? The conclusion seems obvious, and as the trial court found, the plaintiffs' actions, whether intentional or not, were such that pursuant to the doctrine of estoppel in pais, the plaintiffs are barred from asserting the statute of limitations as a defense to the individual defendants' counterclaim.

Under Rule 13(a) URCP, the claim of the individual defendants was that of a compulsory counterclaim, and had to be asserted in this action or forever be barred. While the individual defendants cannot find any language in any Utah decision that would stand for the following proposition, the defendants believe it would be good law for this court to hold: if a defendant has a claim that is a compulsory counterclaim and it is not barred by the statute of limitations at the time a plaintiff commences an action, and if at the time the defendant makes his general appearance in the action, he asserts the compulsory counterclaim or elements thereof and claims relief thereunder, then the plaintiff cannot plead the statute of limitations as a bar to that action. Whether this court will adopt that proposition or another one, the counterclaim of these

defendants should still stand because of the doctrine of estoppel in pais, as found by the trial court.

The Hawaii case cited by the plaintiff, Mauian Hotel, Inc. v. Naui Pineapple Co. 481 P.2d 310, does follow the equitable theory that was submitted to the trial court, and from which the trial court made a determination that the statute of limitations was not a bar to the individual defendants filing their counterclaim herein. The Hawaiian court ruled on the statute of limitations problem as follows:

> "As stated by the New Jersey court in Howard v. West Jersey & Seashore Railroad Co., 102 N.J. Eq. 517, 141 A. 755, 757 (1928):
>
> > '(T)he statute of limitations is for the benefit of individuals, and not to secure general objects of policy; hence it may be waived by express contract or by necessary implication, or its benefits may be lost by conduct invoking the established principles of estoppel in pais * * Also it should be noted that, while the doctrine of estoppel in pais rests upon the ground of fraud, it is not essential that the representations or conduct giving rise to its application should be fraudulent in the strictly legal significance of that term, or with intent to mislead or deceive; the test appears to be whether in all the circumstances of the case conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct; . . . . . (Emphasis added).

This court reached a similar conclusion in Rice v. Granite School District, 23 Utah 2d 22; 456 P.2d 159, where the court states:

> "Where the delay in commencing an action is induced by the conduct of the defendant, or his privies, or an insurance adjustor acting in his behalf, it cannot be availed of by any of them as a defense.

> One cannot justly or equitably lull an adversary into a false sense of security thereby subjecting his claim to the bar of limitations, and then be heard to plead that very delay as a defense to the action when brought." (Emphasis added).

The plaintiffs were aware of the defense and counterclaim of the individual defendants. The plaintiffs were aware of the evidence they must gather and of the documents and real evidence that they would need in order to meet the defendants' counterclaim. The policy reason for the statute of limitations as regards the plaintiffs had thus been met. The plaintiffs knew that the individual defendants intended to file a counterclaim as soon as the plaintiffs amended their complaint so as to name them as parties to the action. While it is true that the individual defendants could have commenced a separate action against the plaintiffs, for them to have done so would have merely resulted in a duplicity of actions, since the controversy and issues were already pending before the trial court. For the plaintiffs to have amended their complaint to name the proper defendants would have helped to keep the court's calendar from being unnecessarily cluttered. Thus the individual defendants chose to trust the representation of the plaintiffs that the complaint would be amended and the proper parties named as defendants. It would be extremely harsh and inequitable to allow the plaintiffs to commence and maintain an action that only named part of the known defendants, as the plaintiffs did herein; promise to amend their complaint so as to state the proper parties, but not doing so until the statute of limitations had run; then allow the plaintiffs to amend their complaint;

and then, after the defendants had filed their counterclaim, have the plaintiffs answer defendants' counterclaim by alleging the statute of limitations as a bar to the defendants' claim.

The plaintiffs argue in their brief that there was "no evidence taken, no proof offered on the question" of estoppel in pais, and that the matter was first raised in argument before the trial judge. Defendants must concede that their initial answer and counterclaim did not raise the issue of estoppel in pais. However, it should be recalled that defendants' answer and counterclaim was filed immediately prior to the plaintiffs filing their second amended complaint and before the plaintiffs had responded to the defendants' counterclaim by alleging the statute of limitations. While the defendants probably should have then amended their answer and counterclaim to allege estoppel, the plaintiffs were put on notice to the defendants' position relative to the same in the brief of the individual defendants in opposition to plaintiffs' motion for summary judgment. At the time of trial, counsel for the individual defendants informed the court that the individual defendants would rely upon the doctrine of estoppel in pais (see Transcript pg. 11, lines 1-10). This was never objected to by counsel for the plaintiffs, and thus by at least the implied consent of the plaintiffs, the matter of estoppel in pais was tried to the court. Under rule 15(b) URCP, the trial court should consider all of the evidence and information available to it, in order to determine the issues before the court, arising either from the pleadings or by consent, either implied or expressed, of the

parties, and thereafter, based on the same, to make and enter its Findings of Fact and Conclusions of Law. In this case, the court could consider all such evidence to determine that the doctrine of "Estoppel in Pais" did apply as a bar to the plaintiffs asserting the statute of limitations as a defense to the compulsory counterclaim of the defendants.

The other statutes of limitations arguments briefly cited and referred to in plaintiffs' brief were fully responded to by the individual defendants in their memorandum in opposition to plaintiffs motion for summary judgment. As far as mineral rights are concerned, it would be impossible for the plaintiffs to claim adverse possession to the same. It was a stipulated fact that the Ralphs had leased the minerals to Chevron in 1965 and had collected all of the rentals from said minerals from 1965 until a producing well was drilled thereon in 1972. There can be no dispute that the plaintiffs paid all of the taxes on the property, but the unrebutted affidavit of Jessie Peatross, Duchesne County Accessor, is on file and of record in the matter, to the effect that "mineral rights have not been assessed in computing property taxes at any time since 1961." Thus the payment by the plaintiffs of the property taxes on the property, which they had a contractual obligation to pay, would have no adverse effect upon the mineral rights of the Ralphs. However, the receipt by the Ralphs of the lease payments for the mineral rights up until the well was drilled in 1972, was certainly adverse to the plaintiffs' interests. The plaintiffs failed to introduce any evidence to indicate that at any time prior to

the commencement of this action that they had requested any portion of the rental payments for the mineral rights. If the plaintiffs had really felt that they had a bona fide right to the minerals, they surely should have made some demand for the payment of the rentals prior to this action.

In any event, the arguments of the plaintiffs regarding the statute of limitations, either as to the three year limitation or as to adverse possession or otherwise, must fail, and the findings of the trial court should stand.

POINT II

THE TRIAL COURT PROPERLY ALLOWED THE TESTIMONY OF MAX GARDNER AND PROPERLY MADE FINDINGS OF FACT AND CONCLUSIONS OF LAW BASED IN PART ON THE TESTIMONY OF MAX GARDNER.

It is the contention of the plaintiffs that Findings 8, 10 and 12 of the trial court were founded entirely upon the testimony of Max Gardner. However, that is an incorrect statement of the evidence. Exhibit 2 is perhaps the best evidence that the court had that the parties only intended to amend the legal description by executing the Amendment to Uniform Real Estate Contract. Although the important language of Exhibit 2 has previously been quoted herein, the individual defendants would again quote the following from Exhibit 2. "WHEREAS, the parties hereto mutually desire to amend said contract the legal description contained therein;" and "Except as herein modified, all remaining terms, conditions and provisions

of said Uniform Real Estate Contract shall remain in full force and effect." (Emphasis added). The language cited above is more than sufficient to justify Findings 8 and 10 of the trial court. It is true that Finding 12 is based entirely upon the testimony of Mr. Gardner. However, the trial court correctly ruled that Mr. Gardner's testimony relative to the conversation between the Ralphs and Mr. Bennett as the President of K. C. Ranches, Inc., was admissible as an exception to the hearsay rule (Transcript pg. 22, lines 8-11; and pg. 32, lines 15-30). It was the ruling of the trial court that plaintiff Doxey-Layton "stands in the same position as K. C. Ranches, and every defense including objections to evidence and the whole bit obtains for that is that they are in no better position than K. C. Ranches, because they are the assignee of K. C. Ranches." (op. cit. pg. 32, lines 26-30.) The principle of law thus stated by the trial court is discussed eariler in this brief on page 10, where authority for the same is also cited. The exception to the hearsay rule that would seem to apply to this particular situation is Rule 63(7) Utah Rules of Evidence, which is as follows:

> (7) Admissions by Parties. As against himself a statment by a person who is a party to the action in his individual or a representative capacity and, if the latter, who was acting in such representative capacity in making the statment."

Since Doxey-Layton, by reason of the assignment from K. C. Ranches, stood in the same position as K. C. Ranches, then the statements made by the president of K. C. Ranches, Inc. could be used in an action involving the assignee of K. C. Ranches,

namely Doxey-Layton. While it is true that neither K. C. Ranches, nor the Bennetts were agents of any of the plaintiffs, nevertheless, agency is not the basis of the exception to the hearsay rule in this instance, but rather the assignment of a principal's right from K. C. Ranches and Bennetts to Doxey-Layton and the statements of that principal at the time the deed was executed is the basis of the exception.

Plaintiffs raise the further objection in their brief as to whether Carl Bennett properly represented K. C. Ranches, Inc. As to what period of time Mr. Bennett's representation is questioned, the plaintiffs remain silent. However, this issue was not raised at the time of the trial of the matter and should now be ignored. Nevertheless, the only conversation of Bennett that was testified to was relative to the execution of Exhibits 2 and 3 and statements made contemporaneously to said execution by Bennett to the Ralphs. The testimony of Gardner relative to Bennett's representations to the Ralphs is certainly consistent with the express terms of Exhibit 2, and leave no real basis for us to question Bennett's ability.

In conclusion, it would seem to the individual defendants, that the plaintiffs are making much to do about nothing as far as the testimony of Gardner is concerned. It would be easier to understand their concern if Gardner's testimony did in fact change any of the provisions contained in Exhibit 2. However, since Gardner's testimony makes it easier to comprehend and understand what the parties intended to do at the time the written documents (Exhibits 2 and 3) were executed, then plaintiffs'

concern seems baffling and unwarranted. The plaintiffs were aware that the defendants would probably call Gardner as a witness and of the substance of his testimony prior to the trial. If they had felt that Gardner's testimony would be untrue or inaccurate, they could have produced their assignor for the purpose of rebutting the same. However, since there was really very little of Gardner's testimony that the plaintiffs could rebut, as indicated above, they have obviously tried to exclude Gardner's testimony as being either hearsay, prejudicial or unbelievable and that failing, now on appeal, to discredit the ability of Mr. Bennett to represent his company to the Ralphs.

There is nothing these defendants can find in either the record or the law to justify any of the contentions of the plaintiffs in that regard. The testimony of Max Gardner was properly allowed by the trial court and Findings were properly made from that testimony.

POINT III

THE TRIAL COURT CORRECTLY HELD THAT THE PLAINTIFFS HAD NO RIGHT TO TERMINATE THE LEASE WITH CHEVRON OIL COMPANY.

One of the greatest difficulties that the plaintiffs have had with this case is to understand that until May 15, 1970, the deed dated August 15, 1963, (Exhibit 3) was a conditional conveyance. While the terms of that deed were absolute, the deed itself could not be delivered and could not become operative

to its grantees until such time as the grantees named therein had fully and faithfully performed all of the covenants and conditions provided for in Exhibits 1 and 2. Therefore, the conveyance or grant of land provided for in Exhibit 3 was conditioned upon K. C. Ranches, Inc. and subsequently Doxey-Layton, faithfully performing all of the covenants of the contract of sale. Neither K. C. Ranches nor Doxey-Layton had a right to that deed prior to the time that the contract had been fully performed, which date was on or about May 15, 1970.

From and after August 15, 1963, the Ralphs remained in open, notarious and continuous "occupancy" of the mineral rights connected with the subject land. The Ralphs and the Ralphs alone received lease payments, first from the lease that was in existence when Exhibit 1 was executed and then from the lease that was executed in 1965. Had K. C. Ranches or any other party tried to assert any ownership over these minerals at any time prior to 1971, they surely would have learned of the interest and claim of the Ralphs. When Doxey-Layton attempted to convey a portion of the mineral rights to the McConkies, the conveyance was done by way of a quit-claim deed (Exhibit 14). However, when Doxey-Layton conveyed its interest in the surface to McConkies, it was done by a warranty deed. The difference in the types of deed used by the plaintiffs is perhaps some indication as to the regard that the plaintiffs had for the legitimacy of their claim for all of the minerals.

From and after August 13, 1965, neither Doxey-Layton nor the McConkies ever made any demand upon the Ralphs for any of

the rentals of the minerals, nor did they make any attempt to renounce the lease or in any way indicate that the Ralphs were without authority to lease the same. If there is a statute of limitation problem in this matter, perhaps it arises from the failure of the plaintiffs to commence an action within three (3) years after the mineral lease to Chevron was recorded on September 23, 1965, as provided in U.C.A. 78-12-26(3) (1974).

Doxey-Layton was well aware of the defect in their title to the minerals when they executed a mineral lease in favor of Flying Diamond Corporation (Exhibit 14). A casual reading of Exhibit 14 indicates that on October 30, 1972, Doxey-Layton was making no warranties or representations as to what they did or did not have, but rather acknowledged that their interest was in dispute. There was no need for that dispute. A reading of Exhibit 1 and 2 should have made it clear to the plaintiffs, that the Ralphs were entitled to 75% of the minerals and that Doxey-Layton, as assignees of K. C. Ranches and Swains were entitled to 25% of the same. If Doxey-Layton would have followed the clear intent of the original parties, then there would have been no disputation between these parties, Chevron would have honored the conveyance of 25% from Ralphs to Doxey-Layton, and the matter would have been settled.

As to other issues raised in Point III of plaintiffs' brief, the individual defendants believe that the arguments raised by the Defendant Chevron in its brief are an adequate response thereto. The mineral lease from Ralphs to Chevron should not be terminated.

CONCLUSION

The trial court made no reversible error, if any error at all, and the Findings of Fact, Conclusions of Law and Judgment of the trial court should be affirmed.

Respectfully submitted,

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